Cyclone Fence, Inc. *and* Local 1191, Laborers' International Union of North America, AFL–CIO. Case 7–CA–42461

April 28, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND BRAME

Upon a charge filed by the Union on October 12, 1999, the General Counsel of the National Labor Relations Board issued a complaint on November 30, 1999, against Cyclone Fence, Inc., the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act. Although properly served copies of the charge and complaint, the Respondent failed to file an answer.

On February 1, 2000, the General Counsel filed a Motion for Summary Judgment with the Board. On February 3, 2000, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response, admitting that it had terminated its business and that unit employees had not been paid since September 30, 1999, acknowledging the complaint allegations that it had failed to bargain over the closing and the failure to pay employees, stating that it has filed a petition in bankruptcy under Chapter 11 of the Bankruptcy Code, and requesting that the case be stayed pursuant to 11 U.S.C. § 362 of the Bankruptcy Code.

The Respondent does not specifically deny any of the complaint allegations. The Respondent in effect asserts that it was faced with compelling economic circumstances when its lender abruptly terminated its line of credit and took all available funds pursuant to their lien rights and that such circumstances excuse its failure to provide notice to and bargain with the Union. Accordingly, we find that the allegations in the motion are undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations provide that any allegation in the complaint not specifically denied or explained shall be deemed admitted to be true and so found by the Board unless good cause to the contrary is shown. The Board recognizes that "the establishment of compelling economic circumstances may excuse a company's failure to bargain over [a] layoff decision,"[1] but that "only in extraordinary situations will this exception apply."[2] In *Nathan Yorke, Trustee*, 259 NLRB 819 (1981), the Board adopted the administrative law judge's finding that the employer violated Section 8(a)(5) and (1) by failing to bargain with the union regarding the effects on unit employees of its decision to terminate operations where the newly appointed bankruptcy trustee acted immediately upon learning of the employer's quickly dwindling assets. The Seventh Circuit court of appeals enforced the Board's decision, as modified, finding that the emergency situation that confronted the trustee in bankruptcy excused the obligation to notify the union before the plant closure, but did not excuse its failure to bargain with the union after the closure over the effects of the closure, stating "[o]nce operations had been terminated, the emergency situation ended."[3]

In the instant case, the General Counsel alleges in the complaint that the Respondent violated Section 8(a)(5) and (1) of the Act by ceasing operations, terminating all unit employees, and failing to pay the wages and appropriate fringe benefits earned by employees, "without prior notice to the Charging Union and without an opportunity to bargain with Respondent with respect to this conduct or the effects of such conduct." The General Counsel seeks as an affirmative remedy an order that the Respondent bargain in good faith with the Union over the *effects* on the unit employees of the cessation of its operations, a *Transmarine* remedy, and an order that unit employees be paid their unpaid wages and fringe benefits for time worked. There is no remedy sought for the failure to bargain over the *decision* to terminate operations or the failure to give *prior* notice of the termination.

As in *Nathan Yorke*, it would appear that the emergency situation that the Respondent was confronted with here might excuse its failure to give prior notice to the Union and afford the Union with an opportunity to bargain about the decision to terminate operations prior to the actual shutdown. However, it also appears that once the "operations had been terminated, the emergency situation ended," and the Respondent's failure to bargain about the effects of the closing constitutes a violation of the Act.[4]

In light of this, we find that the Respondent's response has admitted or failed to specifically deny the allegations of the complaint, and has not raised any issues warrant-

[1] *Lapeer Foundry & Machine,* 289 NLRB 952, 954 (1988), citing *Aquaslide 'N' Dive Corp*., 281 NLRB 219 fn. 2 (1986) (no violation for failure to notify union prior to layoffs where employer acted immediately after receiving notice that the bank had frozen all its assets).

[2] Id. In *Lapeer Foundry,* the employer failed to notify and bargain with the union about its decision to lay off unit employees after a coil burned out on its one remaining furnace. The Board found that failure unlawful, indicating that this situation was not the type of "compelling economic circumstances" that would excuse the company's actions.

[3] 709 F.2d 1138, 1144 (1983).

[4] Id., 709 F.2d at 1144.

ing a hearing.[5] Accordingly, we grant the General Counsel's Motion for Summary Judgment.[6]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation, with an office and place of business in Grand Prairie, Texas and a district office in Garden City, Michigan, has been engaged as a commercial fencing contractor. During the calendar year ending December 31, 1998, the Respondent, in conducting its business operations, derived gross revenue in excess of $500,000. During the calendar year ending December 31, 1998, the Respondent purchased and received at its jobsites within the State of Michigan, goods valued in excess of $50,000 directly from points outside the State of Michigan. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, J. Michael Withers has been the Respondent's general manager and a supervisor within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act. The following employees of the Respondent, hereinafter called the Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(a) of the Act:

> All asphalt shoveler or loader, asphalt plant misc., asphalt raker helper, burlap man, carpenters' helper, yard man, guard rail builder's helper, earth retention barrier and wall and M.S.E. wall installers helper, highway and median barrier installers helper(including sound, retaining and crash barriers), fence erector's helper, dumper(wagon, truck, etc.,), joint filling labor, misc., unskilled labor, sprinkler labor, form setting labor, form stripper, pavement reinforcing, handling and placing (e.g., wire mesh, steel mats, dowel bars, etc.), mason's or bricklayer's tender on manholes, manhole builder, headwalls, etc., waterproofing, (other than buildings) seal coating and slurry mix, shoring, underpinning, bridge painting, etc., (spray, roller and brush), sandblasting, pressure grouting, bridge pin and hanger removal, Material Recycling Laborer, Horizontal Paver Laborer (brick, concrete, clay, stone and asphalt), Ground Stabilization and Modification Laborer, grouting, waterblasting, Top Man, and railroad track and trestle laborer, employed by the Employer at its jobsites in the State of Michigan; but excluding engineering employees, clerical employees, timekeepers, superintendents, assistant superintendents, guards and supervisors as defined in the Act.

Since approximately 1983, and at all material times, the Charging Party Union has been the exclusive collective-bargaining representative of the employees in the unit, and since 1983 has been recognized by the Respondent as such. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective by its terms from June 1, 1998 through June 1, 2003.

At all times since about 1983, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit.

On or about October 8, 1999, the Respondent ceased all operations at, and closed, its Garden City facility, terminating all its employees.

Since about late September 1999, the Respondent has failed to pay the wages earned by employees in the unit and has failed to pay the appropriate fringe benefits for those employees, including but not limited to vacation, pension, health care, annuity, and training as set forth in the 1998–2003 collective-bargaining agreement.

These subjects relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects of bargaining. The Respondent engaged in the behavior described above without prior notice to the Union and without providing the Union an opportunity to bargain with the Respondent with respect to this conduct or the effects of this conduct.

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[5] *C & H Moving and Storage Co.,* 299 NLRB No. 62 (1990) (not reported in Board volumes), is distinguishable. There, in a motion for summary judgment proceeding, the Board found genuine issues of material fact were raised with respect to par. 12 of the Motion for Summary Judgment where it appeared from the remedy sought in the complaint that the General Counsel was alleging as unlawful the respondent's failure to bargain over the cessation of operations. In those circumstances, the Board found that the defenses raised by the respondent (that it did not violate the Act because its failure to pay wages and fringe benefits was due to its inability to pay and the decision to close the plant was the result of economic emergency beyond the control of either itself or the union) were sufficient to defeat the General Counsel's Motion for Summary Judgment on those issues. Id. slip op. at 2.

As noted above, in the instant case it appears from the remedy sought in the complaint that the General Counsel is alleging as a violation only the Respondent's failure to bargain over the *effects* of the decision to terminate operations, and not the decision itself. Accordingly, we find it appropriate to grant summary judgment on this issue.

Because Member Brame agrees that the violation alleged deals with a failure to bargain over the effects of the decision to terminate operations, he finds it unnecessary to rely on the text set out earlier and the accompanying fn. 2 which deals with a failure to bargain about the *decision* to lay off unit employees.

[6] Although the Respondent's response also indicates that it has filed a petition under Chapter 11 of the Bankruptcy Code, and asserts that the instant unfair labor practice proceedings are or should be stayed pursuant to 11 U.S.C. § 362, it is well established that the institution of bankruptcy proceedings does not deprive the Board of jurisdiction or authority to entertain and process an unfair labor practice case to its final disposition. *Phoenix Co*., 274 NLRB 995 (1985). Board proceedings fall within the exception to the automatic stay provisions for proceedings by a governmental unit to enforce its police or regulatory powers. See id., and cases cited therein.

CONCLUSIONS OF LAW

By the acts and conduct described above, the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective bargaining representative of its employees, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(1) and (5) of the Act by failing to bargain with the Union over the effects of its decision to close its Michigan facility, we shall order the Respondent, on request, to bargain with the Union concerning the effects of its decision to cease operations. As a result of the Respondent's unlawful failure to bargain in good faith with the Union, the terminated employees have been denied an opportunity to bargain through their collective-bargaining representative. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union. A bargaining order alone, therefore, cannot serve as an adequate remedy for the unfair labor practices committed.

Accordingly, we deem it necessary, in order to effectuate the purposes of the Act, to require the Respondent to bargain with the Union concerning the effects of closing its facility on its employees, and shall accompany our order with a limited backpay requirement designed both to make whole the employees for losses suffered as a result of the violations and to re-create in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent. We shall do so by ordering the Respondent to pay backpay to the terminated employees in a manner similar to that required in *Transmarine Navigation Corp*., 170 NLRB 389 (1968).[7]

Thus, the Respondent shall pay its terminated employees backpay at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of this Decision and Order until occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the closing of its facility on its employees; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 days of the Respondent's notice of its desire to bargain with the Union; (4) the Union's subsequent failure to bargain in good faith; but in no event shall the sum paid to these employees exceed the amount they would have earned as wages from the date on which the Respondent terminated its operations, to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner; provided, however, that in no event shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ. Backpay shall be based on earnings which the terminated employees would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In addition, having found that the Respondent has failed to pay the wages earned by employees in the unit and has failed to pay the appropriate fringe benefits for said employees, including, but not limited to, vacation, pension, health care, annuity and training as set forth in the 1998–2003 collective-bargaining agreement, we shall order the Respondent to make whole the unit employees by paying to them the amount of wages they earned and by making all contractually required contributions to the fringe benefit funds, including any additional amounts applicable to such delinquent payments as determined pursuant to *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn.7 (1979). In addition, the Respondent shall reimburse unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[8]

In view of the fact that the Respondent's facility is currently closed, we shall order the Respondent to mail a copy of the attached notice to the Union and to the last known addresses of its former employees in order to inform them of the outcome of this proceeding.

ORDER

The National Labor Relations Board orders that the Respondent, Cyclone Fence, Inc., Grand Prairie, Texas

[7] In its response to the Notice to Show Cause, the Respondent stated that it was trying to liquidate its intellectual property in an attempt to create resources from which creditors can be paid. Thus, the Board can reasonably conclude that if the Respondent had bargained about the shutdown immediately after the closing, the Union would have had some leverage in obtaining concessions.

[8] To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, the respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the respondent otherwise owes the fund.

and Garden City, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Local 1191, Laborers International Union of North America, AFL-CIO, which is the designated exclusive collective-bargaining representative of the Respondent's employees in the appropriate unit, over the effects of its decision to close its Michigan operations. The appropriate unit consists of:

> All asphalt shoveler or loader, asphalt plant misc., asphalt raker helper, burlap man, carpenters' helper, yard man, guard rail builder's helper, earth retention barrier and wall and M.S.E. wall installers helper, highway and median barrier installers helper (including sound, retaining and crash barriers), fence erector's helper, dumper(wagon, truck, etc.,), joint filling labor, misc., unskilled labor, sprinkler labor, form setting labor, form stripper, pavement reinforcing, handling and placing (e.g., wire mesh, steel mats, dowel bars, etc.), mason's or bricklayer's tender on manholes, manhole builder, headwalls, etc., waterproofing, (other than buildings) seal coating and slurry mix, shoring, underpinning, bridge painting, etc., (spray, roller and brush), sandblasting, pressure grouting, bridge pin and hanger removal, Material Recycling Laborer, Horizontal Paver Laborer (brick, concrete, clay, stone and asphalt), Ground Stabilization and Modification Laborer, grouting, waterblasting, Top Man, and railroad track and trestle laborer, employed by the Employer at its jobsites in the State of Michigan; but excluding engineering employees, clerical employees, timekeepers, superintendents, assistant superintendents, guards and supervisors as defined in the Act.

(b) Since about late September 1999, failing and refusing to pay the wages earned by employees in the unit and failing to pay the appropriate fringe benefits for those employees, including but not limited to vacation, pension, health care, annuity, and training as set forth in the 1998–2003 collective-bargaining agreement.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union concerning the effects on the unit employees of the termination of the Respondent's operations at its Garden City, Michigan facility, and the termination of its employees, and reduce to writing and execute any agreement reached as a result of such bargaining.

(b) Pay its former unit employees backpay at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of this Decision and Order until occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the closing of its facility on its employees; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 days of the Respondent's notice of its desire to bargain with the Union; (4) the Union's subsequent failure to bargain in good faith; but in no event shall the sum paid to these employees exceed the amount they would have earned as wages from October 8, 1999, the date on which the Respondent terminated its operations, to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner; provided, however, that in no event shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ, with interest, as set forth in the remedy portion of this decision.

(c) Pay unit employees the wages earned by employees since about late September 1999, and pay the appropriate fringe benefits for those employees, including but not limited to vacation, pension, health care, annuity, and training as set forth in the 1998–2003 collective-bargaining agreement.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, duplicate and mail, at its own expense and after being signed by the Respondent's authorized representative, signed and dated copies of the attached notice marked "Appendix"[9] to the Union and to all current and former unit employees.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT refuse to bargain with Local 1191, Laborers International Union of North America, AFL–CIO, which is the designated exclusive collective-bargaining representative of the Respondent's employees in the appropriate unit, over the effects of its decision to close its Garden City, Michigan operations. The appropriate unit consists of:

> All asphalt shoveler or loader, asphalt plant misc., asphalt raker helper, burlap man, carpenters' helper, yard man, guard rail builder's helper, earth retention barrier and wall and M.S.E. wall installers helper, highway and median barrier installers helper (including sound, retaining and crash barriers), fence erector's helper, dumper (wagon, truck, etc.,), joint filling labor, misc., unskilled labor, sprinkler labor, form setting labor, form stripper, pavement reinforcing, handling and placing (e.g., wire mesh, steel mats, dowel bars, etc.), mason's or bricklayer's tender on manholes, manhole builder, headwalls, etc., waterproofing, (other than buildings) seal coating and slurry mix, shoring, underpinning, bridge painting, etc., (spray, roller and brush), sandblasting, pressure grouting, bridge pin and hanger removal, Material Recycling Laborer, Horizontal Paver Laborer (brick, concrete, clay, stone and asphalt), Ground Stabilization and Modification Laborer, grouting, waterblasting, Top Man, and railroad track and trestle laborer, employed by the Employer at its jobsites in the State of Michigan; but excluding engineering employees, clerical employees, timekeepers, superintendents, assistant superintendents, guards and supervisors as defined in the Act.

WE WILL NOT fail and refuse to pay the wages earned by employees in the unit since about late September 1999, and the appropriate fringe benefits for those employees, including but not limited to vacation, pension, health care, annuity, and training as set forth in the 1998–2003 collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union concerning the effects on the unit employees of the termination of our operations at our Garden City, Michigan facility, and the termination of our employees, and reduce to writing and execute any agreement reached as a result of such bargaining.

WE WILL pay our former employees in the unit described above who were employed at the time of our closing their normal wages for the period of time set forth in the decision underlying this notice to employees, with interest.

WE WILL pay the wages earned by our unit employees since about late September 1999, and pay the appropriate fringe benefits for those employees, including but not limited to vacation, pension, health care, annuity, and training as set forth in the 1998–2003 collective-bargaining agreement.

CYCLONE FENCE, INC.